IN THE

Supreme Court of the United States

October Term, 1958. No. 308.

AMY C. MELLOTT, PAUL C. MELLOTT, and FORREST R. MELLOTT, a minor, and KAY VIRGINIA MELLOTT, a minor, by their guardian, The Valley National Bank of Chambersburg,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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INDEX

PAGE

TABLE OF CITATIONS

Lisbon Shops, Inc. v. Koehler, 353 U. S. 382, 386 3

TABLE OF STATUTES

Sec. 170. Internal Revenue Code of 1939 2

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

It is urged that the petition for certiorari (denied October 20, 1958, be reconsidered because of the fundamental constitutional question presented.

There is no historical precedent for the executive and judicial to defy the legislative.

The consequences of any step in this direction are tremendous.

Congress has passed a law within the powers granted to it by the Constitution:

> "The benefit of the deduction for net operating losses allowed by section 23 (s) **shall** be allowed to estates * * *"
>
> *Sec. 170. Internal Revenue Code of 1939.*

The executive has refused to apply that law. The judicial has upheld the executive. They have changed the law to read:

> "The benefit of the deduction for net operating losses allowed by section 23 (s) shall **not** be allowed to estates."

Is this one of the signs of the times?

The decedent died intestate and his widow and young son as administrators wound up his business, which, because of its complexity and size took several years. Its size was fixed—*it was the total amount of business initiated by the decedent.*

Over the period of administration, the net result was a profit.

However, federal income tax being computed annually, the process of winding up the decedent's estate had to be cut off and measured annually.

If the entire administration could have been completed within one year, we would have had no problem here today

As of the end of the first year, there was a large profit. As of the end of the second year—in the very nature of things, the administration being a process of winding up—there was a loss.

To tax the profit of the first year without allowing any reduction for the loss of the second year is *in direct violation of the specific terms of the statute*; and besides that it is manifestly unfair.

Nor should the fortuitous choice of an **accounting period** affect the net result of the tax due on a total fixed amount of business left by a decedent. Herman Mellott died July 16, 1948, and the capable C. P. A. who was consulted put the estate on a fiscal year basis ending July 30, 1949; and this is the year that showed profit. The second fiscal year ending June 30, 1950, showed the loss.

If he had the benefit of foresight as we now have of hindsight, he could have kept the calendar year of the decedent and closed the books December 31, 1948.

Then, the first tax return of the estate would be for only 6 profitable months, and the profit for the second 6 months would have been offset against the loss of the remaining and necessarily dwindling business of the second year.

But the C. P. A. could not foresee that the principal of *Lisbon Shops, Inc. v. Koehler*, 353 U. S. 383, 386, would be repudiated, and

> "The benefit of the deduction for net operating losses allowed by section 23 (s) **shall** be allowed to estates * * *"

would be changed by the Court below to read:

> "The benefit of the deduction for net operating losses allowed by section 23 (s) **shall not** be allowed to estates."

It is **not** a question of *construing* or *interpreting* a statute. The statute has been ignored, and the *direct opposite* of its provisions applied.

Accordingly, we respectfully pray that the Court reconsider, and allow certiorari.

HENRY D. O'CONNOR,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the constitutional question not previously presented, viz., the right of the executive and judicial to disregard the mandatory direction of the legislative.

HENRY D. O'CONNOR,
Attorney for Petitioners.